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Case No. 82-704

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

and

OFFICE OF CONSUMERS' COUNSEL,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION OF APPELLEE, OFFICE OF THE CONSUMERS' COUNSEL, TO DISMISS APPEAL, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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STATEMENT OF THE CASE

Appellee, the Office of the Consumers' Counsel, will confine its statement of the case to those points with which it disagrees with the Appellant's Statement of the Case in Appellant's statement in support of its jurisdiction. The procedural aspects of this case with respect to the course of proceedings below, as set forth in Appellant's Jurisdictional Statement, are correct except as noted hereafter.

As Exhibit I attached to Appellant's Jurisdictional Statement reveals, the procedural history of the issue on which the instant appeal is based is complicated. It bears emphasizing that the proceeding herein appealed from is nothing more than the mechanical manifestation of the Public Utilities Commission of Ohio's compliance with the Mandate issued to it by the Ohio Supreme Court in Consumers' Counsel v. Pub.

Util. Comm., 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), already reviewed by this Court in The Cleveland Electric Illuminating Company v. Office of Consumers' Counsel, et al., United States Supreme Court Case No. 81-1002 (February 25, 1982); 71 L.Ed.2d 455 (1982).

Appellant raises no new issues in this appeal, but rather seeks merely to relitigate the decision of the Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Comm., supra. The question faced by the Ohio Court was simply whether costs associated with terminated nuclear units were a proper cost of service upon which a utility's rates could be based. At question was Ohio Rev. Code §4909.15(A)(4), which statute governs ratemaking in Ohio. The crux of the controversy in this case is best stated in the words of the Ohio Supreme Court:

> The controversy surrounding the cancelled nuclear power plants focuses

primarily on R.C. 4909.15(A)(4), which delineates the service-related costs that a utility may recover from its ratepayers. This section states in relevant part:

"The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges shall determine:

"***

"(4) The cost to the utility of rendering the public utility service for the test period***."

The commission urges that "an expenditure by a utility can be considered a cost of rendering the public utility service if it fails in fact to achieve its intended purpose*** [if] the expense was reasonably calculated to provide [future] utility service at a reasonable cost." The underpinnings for the commission rationale may be found in those statutory provisions that require utilities to maintain adequate service presently and for the foreseeable future. See, e.g., R.C. 4905.22 (adequate service and facilities).

Notwithstanding the provisions that impose a duty on utility companies to plan for the future, the question under R.C. 4909.15(A)(4) remains whether the cancelled plant expenditures represent "[t]he cost to the utility of rendering the public utility service for the test period." Test period considerations aside, what the company sought and what the commission granted was the amorti-

zation as service-related costs of an investment that never provided any service whatsoever to the utility's customers.

We seriously question whether the General Assembly contemplated that the commission would treat the type of expenditures controverted herein as costs under R.C. 4909.15(A)(4). The now terminated nuclear plants represented a major capital investment that ultimately would have been included in the rate base under R.C. 4909.15(A)(1), had the projects not been cancelled. It is our opinion that R.C. 4909.15(A)(4) is designed to take into account the normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period.[8] A nonexhaustive list of such expenses would include reasonable expenditures for repairs, maintenance, personnel-related costs, administrative expenses, and taxes.

The extraordinary loss sustained by CEI in connection with the terminated nuclear plants cannot be transformed into an ordinary operating expense pursuant to R.C. 4909.15(A)(4) by commission fiat. The commission's statement that "[c]ancellation does not create a past loss, but gives rise to a current cost" is unpersuasive. Under this rationale we question whether there could ever be a "past loss" the return of which would not be recoverable in future ratemaking proceedings notwithstanding the commission's assertion to the contrary. The commission's characterization of the investment in the

> four terminated plants as "cost" under R.C. 4909.15(A)(4) in light of what we perceive to be the legislative intention underlying that section is unreasonable. Therefore, to the extent that the commission's order in regard to the cancelled plants is predicated on R.C. 4909.15(A)(4), the order cannot stand.
>
> Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

This excerpt from the court's opinion clearly demonstrates the limited scope of the issue on appeal. As noted by Appellant, this Court dismissed the appeal from the Ohio Supreme Court decision above in Case No. 81-1002 (February 25, 1982).

Appellant correctly claims that Appellee argued to this Court in Case No. 81-1002 that a constitutional question was not timely raised nor ruled upon by the Ohio Supreme Court. However, Appellant is mistaken in its insinuation that, only after this Court dismissed its appeal in Case No. 81-1002, did Appellee then intervene in Appellant's subsequent appeal to the Ohio Su-

preme Court from Public Utilities Commission of Ohio Case No. 81-1096-EL-COI (COI Order) and argue that the Ohio Court had, indeed, decided the constitutional question. The accurate facts are that Appellee did intervene in Appellant's appeal from the COI Order in a timely fashion pursuant to Ohio Supreme Court rules. Appellee argued, not that the Ohio Court had decided the constitutional question, but rather that Appellant's attempt to litigate an already litigated issue with identical facts on new grounds was barred by the doctrine of res judicata, as discussed below.

Additionally, Appellant continues to assert its timeliness in raising a constitutional question in spite of this Court's dismissal of Case No. 81-1002 for want of a properly presented federal question. The Cleveland Electric Illuminating Company v. Office of the Consumers' Counsel, et al.

supra (February 25, 1982). The plain fact is that there is no constitutional question here; the Ohio Supreme Court has clearly limited its decision to a determination as to what costs appropriately fall within the meaning of Ohio Rev. Code §4909.15(A)(4). There is nothing inherently unconstitutional in excluding from the cost of service the costs of cancelled generating plants which will never provide service.

Thus, this Court, faced now with the same appeal faced by it less than a year ago should, once again, dismiss it on the bases set forth below.

MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1(b), and 16.1(d) Appellee, Office of the Consumers' Counsel, hereby moves that this Court dismiss the Appeal of the Cleveland Electric Illuminating Company as improperly ta-

ken from the Supreme Court of Ohio under 28 U.S.C. §1257(2). In the alternative, the Office of the Consumers' Counsel moves that this Court affirm the decision of the Supreme Court of Ohio rendered in the case below.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

The Appellant has invoked the jurisdiction of this Court under 28 U.S.C. §1257 (2), which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * * *

The express language of 28 U.S.C. §1257(2) requires that the highest court of

a state render a decision favoring the validity of a state statute before review of the state court decision may be sought in the Supreme Court of the United States. The necessary predicate of an appeal under 28 U.S.C. §1257(2) is, therefore, that the validity of the state statute in question must first be challenged in the state court. Where the highest court of a state is not called upon to review a statute claimed to be in conflict with the United States Constitution, or where that state court renders a decision which does not address the validity of the statute, an appeal under 28 U.S.C.A. §1257(2) will not lie. Kulko v. Superior Court of California, 436 U.S. 84 (1978).

In the present case the Appellant is again trying to present arguments already considered by this Court regarding its claim that it properly raised the issue of

the constitutional validity of Ohio Revised Code §§4905.22 and 4909.15(A)(4).

This Court on February 25, 1982 dismissed Appellant's appeal from Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), "for want of a properly presented federal question". The Cleveland Electric Illuminating Company v. Office of Consumers' Counsel, et al., United States Supreme Court Case No. 81-1002 (February 25, 1982), 71 L. Ed.2d 455 (1982). CEI now wishes to try to invoke this Court's jurisdiction through this back door request seeking review of the same issue presented in Consumers' Counsel, supra.

The appeal in the instant case is brought from the Ohio Public Utilities Commission's response (PUCO Case No. 81-1096-EL-COI, decided October 21, 1981) to the Ohio Supreme Court's remand in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d

153, 423 N.E.2d 820 (1981). This appeal is simply a relitigation of the same questions contained in Appellant's previous jurisdictional statement, which the Court addressed by summary dismissal.

Appellant presents herein the same questions presented to this Court in its prior statement of jurisdiction. The questions set forth in the Jurisdictional Statement in the former appeal are as follows:

QUESTIONS PRESENTED

1. May the State of Ohio, by statute, constitutionally require a public utility to invest its capital to provide adequate service for the convenience of the public in the future and simultaneously prohibit, by statute, the utility from recovering through rates such capital when prudently invested?

2. May the State of Ohio, by statute, constitutionally prohibit a public utility from recovering through rates its capital, prudently invested for the convenience of the public where the undisputed facts show that the utility, and its investors, have never been compensated through the authorized or

achieved rate of return for the risk of exclusion of such costs from rates?

The Cleveland Electric Utility Company v. Office of Consumers' Counsel, et al., United States Supreme Court Case No. 81-1002 (February 25, 1982); 71 L. Ed.2d 455 (1982).

* * * *

In the case sub judice, Appellant presents the following questions in its Jurisdictional Statement:

QUESTIONS PRESENTED

1. May the State of Ohio, by statute constitutionally require a public utility to invest its capital for the convenience of the public to provide adequate service in the future and simultaneously prohibit, by statute, that utility from recovering through rates such capital when prudently invested?

2. May the State of Ohio, by statute constitutionally prohibit a public utility from recovering through rates its capital, prudently invested for the convenience of the public, where the undisputed facts show that the utility, and its investors, have never been compensated through the authorized rate of return for the risk of exclusion of such costs from rates?

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mission of Ohio, et al., United States Supreme Court Case No. 82-704.

Clearly Appellant currently seeks review of the same questions already considered by this Court in Case No. 81-1002.

It bears repeating that this appeal is brought from a proceeding which, although captioned independently, cannot be separated from the Ohio Court's decision in Consumers' Counsel, supra. The COI Order was merely a continuation of the earlier proceedings requiring compliance with the Ohio Court's Mandate. Practically speaking, Appellant requests that this Court, having already denied review of the Ohio Court's decision, less than a year ago, step into the proceeding at a different, later time to gain results already denied to Appellant. It follows that, if Appellant failed to raise properly any federal question in Consumers' Counsel, supra, it cannot cure that failure by an attempt to raise a fed-

eral question when the Public Utilities Commission of Ohio merely complies with the Mandate of the Ohio Supreme Court in Consumers' Counsel.

Rule 15.1(a) of the Rules of the Supreme Court of the United States (U.S. Sup. Ct. Rule 15, 28 U.S.C.A.) requires that a jurisdictional statement contain the questions to be presented by the appeal. Many decisions have labelled a Jurisdictional Statement as the indicator of what issues the Supreme Court has decided in a summary disposition. Mercado v. Rockefeller, 502 F.2d 666 (2d Cir. 1974); Cert. den. 420 U.S. 925 (1975). The Office of Consumers' Counsel submits that this Court has already disposed of the questions submitted in this appeal by its dismissal in Case No. 81-1002.

Furthermore, this Court has ruled on numerous occasions that summary affirmances and dismissals without doubt reject the

specific challenges presented in the Statement of Jurisdiction. Mandel v. Bradley, 432 U.S. 173 (1977). This Court, in its Per Curiam opinion of the constitutionality of Maryland's Election Code, emphasized that summary actions should not be understood as breaking new ground, but as applying principles established by prior decisions to the particular facts involved. This Court further indicated that summary affirmances and dismissals prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by the issues in the cases summarily dismissed. Mandel v. Bradley, supra.

Since the questions presented are identical in the two CEI appeals, it should follow, pursuant to Mandel, supra, that the prior decision is dispositive of the issues presented in this appeal.

Moreover, it is equally clear that a summary disposition either by affirmance or by dismissal is a disposition on the merits and should not need to be reconsidered by the Court. Hicks v. Miranda, 422 U.S. 332 (1975). Appellant has had its day in Court, and has been unsuccessful. Appellant, having failed to obtain this Court's review of a claimed federal question in its appeal from Consumers' Counsel, cannot revive its already unsuccessful arguments in an appeal from an order which simply carried out the Ohio Court's Mandate. The summary dismissal of the issues presented in Case No. 81-1002 is, therefore, dispositive of the issues presented herein.

It is also clear that relitigation of the identical facts on grounds either previously presented or grounds Appellant failed to present in a proper and timely

fashion is barred by the doctrine of res judicata.

The doctrine of res judicata operates to bar repetitious suits involving the same cause of action. The doctrine is based upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. Sea-Land Service v. Gaudet, 414 U.S. 573, 578-579 (1974). This Court has also previously noted that res judicata is founded upon "the generally recognized public policy that there must be some end to litigation and that when one appears in Court to present his case, is fully heard, and the constituted issue is decided against him, he may not later renew the litigation in another Court." Heiser v. Woodruff, 327 U.S. 726, 733 (1946).

The Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d

153, 423 N.E.2d 820 (1981) disallowed recovery, as an allowable operating expense, of the costs associated with the cancelled plants. This Appellant in Case No. 81-1002 sought review by this Court of the decision of the Ohio Supreme Court in Consumers' Counsel, supra. The Court dismissed Appellant's appeal in Case No. 81-1002 for failure to properly present a federal question.

In accordance with the Opinion of the Ohio Supreme Court in Consumers' Counsel, supra, the Public Utilities Commission of Ohio reduced Appellant's rates, removing therefrom the expenditures associated with the terminated nuclear units. Appellant prosecuted an appeal to the Ohio Supreme Court from the decision of the Public Utilities Commission of Ohio implementing the mandate of the Ohio Supreme Court in Consumers' Counsel, supra, arguing that the Court's original determination in Consum-

ers' Counsel was incorrect. Following the filing of a motion to dismiss by the Office of the Consumers' Counsel responding to said appeal, the Ohio Supreme Court dismissed Appellant's appeal.

Appellant in the instant proceeding was an intervening Appellee in Consumers' Counsel and did present numerous arguments in favor of the validity of the Public Utilities Commission's decision in Case No. 79-537-EL-AIR before the Ohio Supreme Court. Subsequently, Appellant sought to present perceived constitutional issues to this Court for the first time in Case No. 81-1002, never before presented to the Public Utilities Commission and presented to the Ohio Court only after its decision in Consumers' Counsel.

It is apparent that Appellant had the opportunity to present its constitutional arguments, as an intervening Appellee, both

to the Public Utilities Commission of Ohio and the Ohio Court, in Consumers' Counsel, supra. Appellant is now, through this second proceeding, seeking to present an argument which was not made in a timely manner in Consumers' Counsel, supra.

This Court was faced with a similar situation in Grubb v. Pub. Util. Comm., 281 U.S. 470 (1930). In Grubb this Court stated:

> In his bill the appellant assails the validity of the order upon one ground not brought to the attention of the state court - a ground arising out of the granting to another interstate motor line of a certificate to operate busses over a route including the loop at Portsmouth; and he insists that this ground of objection is not concluded by the judgment of the state court, and therefore is open to examination and adjudication upon its merits by the district court. But the judgment has a broader operation as res judicata than is thus suggested. The certificate referred to was granted several months before the appellant applied for a certificate and he had personal knowledge of it from the time it was granted. It was shown upon the records of the commission and was easily accessible when the hearing was had upon his applica-

tion. Thus it is a matter which, if having the bearing now suggested, could have been brought to the attention of the commission either at that hearing or in his request for a rehearing (543, General Statutes); and, if it was not then given proper effect, he could have brought it to the attention of the state court and have made the same claim in respect of it that is now made in his bill.

The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent of the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that.

As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.

Grubb, supra, at 478-479. (Emphasis added).

Appellant seeks to address the same issue on a ground available to it, but not

put forward for the Court's opinion, in Consumers' Counsel, supra. The issue is the same; the parties are the same; and the facts are the same. Having failed to persuade the Ohio Supreme Court through its arguments in Consumers' Counsel, supra, and this Court in Case No. 81-1002, the Appellant now wishes the same parties to relitigate the same issue based upon the same facts.

The appropriate question is how many times must we reargue the question. This Appellee most strenuously objects to a piecemeal approach to litigation. Appellant had a prior opportunity to present its arguments on the identical facts presented in the proceeding sub judice, and apparently chose not to do. so. The doctrine of res judicata compels dismissal.

Wherefore Appellee requests this Honorable Court dismiss the instant appeal.

MOTION TO AFFIRM

Appellant has presented this Court with two grounds pursuant to which it claims plenary consideration should be given. The first related to Appellant's argument that the Ohio Supreme Court erred in its interpretation of an Ohio statute. The second argument asserts that the Ohio Supreme Court's decision in this case is in conflict with the decision of this Court in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944). Both arguments are without merit, and this Court should affirm the ruling of the Ohio Supreme Court.

In the case sub judice, the Ohio Supreme Court dismissed an appeal by Appellant from a decision by the Public Utilities Commission of Ohio in Case No. 81-1096-EL-COI. In Case No. 81-1096-EL-COI the Commission reduced Appellant's rates in

accordance with the Ohio Supreme Court's mandate in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 423 N.E.2d 820 (1981). What Appellant has sought to do is to use the instant appeal to make arguments which it failed to present in Consumers' Counsel, supra. Bearing in mind these brief comments, Appellee will now address Appellant's arguments in support of its appeal.

The underpinnings to Appellant's first jurisdictional argument rest upon the faulty premise that the expenditures associated with the cancelled plants provided service to the company's customers. Such an assertion is contrary to the specific determination of the Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), wherein the Court stated "... what the company sought and what the commission granted, was

the amortization as service related costs of an investment that never provided any service whatsoever to the utility's customers." Id., at 164. The theory advocated by Appellant, that the expenditures somehow provided service to the ratepayers, was explicitly rejected by the Ohio Supreme Court. It is patently obvious that the expenditures never provided any service to the ratepayers.

Appellant also seeks to convince this Court that the expenditures in question were current operating expenditures. The Ohio Supreme Court soundly rejected this ploy, noting as well that the Public Utilities Commission of Ohio could not convert past losses into operating expenses by Commission fiat. Consumers' Counsel, supra, at 164.

It is axiomatic that a utility has no constitutional right to recover for past

losses. See, Bluefield Water Works Co. v. Pub. Serv. Comm. of West Virginia, 262 U.S. 679, 694 (1923). As was stated in Los Angeles Gas & Electric Corp. v. R.R. Commission, 289 U.S. 287, 313 (1933), "...Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, anymore than past profit can be used, to sustain confiscatory rates for the future." These expenditures were found to be past losses and not recoverable operating expenses within the meaning of Ohio Rev. Code §4909.15(A)(4).

A second problem underlying Appellant's argument hinges upon its continued reliance upon Ohio Rev. Code §4905.22. The Court's decision in Consumers' Counsel, supra, was specifically limited to "whether the cancelled plant expenditures represent (t)he cost to the utility of rendering the public utility service for the test year." Id.,

at 163. Regardless of the Appellant's assertions to the contrary, it is clear that the Ohio court strictly limited its determination as to what costs appropriately fall within the meaning of Ohio Rev. Code §4909.15(A)(4). Therefore, even if a federal question had been reviewed, it could only concern the state court's narrow holding in the case below and does not involve Ohio Rev. Code §4905.22.

The Ohio Court further found that "R.C.4909.15(A)(4) is designed to take into account the normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period." Id. Hence, it is clearly apparent that the decision below was derivative of the plain meaning of the statute's language. Appellant's investors have no statutory right to recover their investment, through amortization as service-related

costs, when that "investment***never provided any service whatsoever." Id. In reaching this holding, the Ohio Supreme Court was fairly interpreting the law of the state of Ohio. This Court should affirm the Ohio Court's decision as the United States Supreme Court has stated that state "courts have the final authority to interpret, and where they see fit, to reinterpret (their) State's legislation." Garner v. Louisiana, 368 U.S. 157, 169 (1961).

Appellant further undertakes a rather lengthy discussion regarding the applicability of a particular portion of the Uniform System of Accounts. It appears that Appellant is seeking to convince this court that, contrary to the finding in Consumers' Counsel, supra, the cost associated with the cancelled facilities are test year operating expenses. It hardly bears stating that Ohio law as interpreted by the Ohio

Court, and not the Uniform System of Accounts, governs the determination of proper test year operating expenses.

It is clear that determination of costs within the meaning of Ohio Rev. Code §4909.15(A)(4) does not present a federal question. The Ohio Supreme Court limited its decision in Consumers' Counsel, supra, to a narrow interpretation of Ohio Rev. Code §4909.15(A) which defines allowable operating expenses. The dismissal appealed from did not alter the decision in Consumers' Counsel, supra, rather it affirmed the narrow holding. As this Court stated in Durley v. Mayo, 351 U.S. 277, 281 (1956):

> It is a well-established principle of this Court that before (the Court) will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause.
>
> (Emphasis added).

The Ohio Court's dismissal below, affirming Consumers' Counsel, supra, was strictly limited to a narrow issue involving Ohio Rev. Code §4909.15(A((4). There was no resolution of a federal question, nor was one called for. The decision rests upon an adequate state ground.

Where both federal and state questions have been decided by the state court, "[it] is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even when those judgments also decide federal questions." Henry v. Mississippi, 379 U.S. 443, 446 (1965). The rationale for the adequate state ground rule was recently reiterated by this Court in Zacchini v. Scripps-Howard Broadcasting Co.: "[O]ur only power over state judgments is to correct them to the

extent that they incorrectly adjudge federal rights." 433 U.S. 562, 566 (1977).

Therefore, due to the nonexistence of a federal question in this case this Court should affirm the decision of the Ohio Supreme Court. In addition, even if it is assumed, arguendo, that a federal question had been presented to the Ohio Supreme Court, that court rendered a decision only on a state question, thus leaving this Court with nothing over which to exercise its jurisdiction.

Without doubt the ultimate disposition of the proceeding below hinged upon the appropriate definition of the word "cost" as found in Ohio Rev. Code §4909.15(A((4). The interpretation of "cost" neither presents a federal question, nor gives rise to one. The disposition of the issue involves only state law.

Appellant's second jurisidictional argument is based upon Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1941). Appellant asserts that the Ohio Supreme Court's interpretation of Ohio Rev. Code §§4909.15(A((4) and 4909.22 results in an unconstitutional deprivation of property without due process of law. The underpinning of Appellant's argument is, of course, Hope Natural Gas Co., supra, wherein the Court stated:

> The ratemaking process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Co. Case that "regulation does not insure that the business shall produce net revenues." 315 US p 590, 86 L ed 1052, 62 S Ct 736. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business... That return, moreoever, should be sufficient to assure confidence in the financial integrity of the

> enterprise, so as to maintain its credit and to attract capital. ...
>
> Hope Natural Gas Co., supra at 603.

Appellant did express in its 1979 Annual Report an opinion regarding the impact of a disallowance, as was noted in a concurring opinion in Consumers' Counsel, supra:

> CEI informed its investors in its "1979 Annual Report": "***The Company (CEI) will seek the approval of the Federal Energy Commission and the Public Utilities Commission of Ohio for authority to amortize (the costs previously expended toward the four nuclear units whose construction CAPCO terminated) over a suitable number of years. The extent to which these costs may be recovered through rates will be determined by the PUCO. If any costs of termination are not permitted to be recovered, the Company would be required to reduce net income by the disallowed amount. In any event, the resolution of these matters should not have a material adverse impact on the financial position of the Company.
>
> Id., at 171.
> (Emphasis added).

The Appellant recognized that a disallowance would not adversely impact its financial integrity. Further, it was noted

that recovery of the costs would be determined by the Public Utilities of Ohio, and ultimately, as investors are well aware, by the Ohio Supreme Court.

Appellant's investors, it must be presumed, were cognizant of and took into account the statement by Appellant that disallowance of the construction expenses should have no material adverse impact on the financial position of the company. For this reason, it cannot be suggested that the investors in CEI were unaware of the risk. As this Court noted in Bluefield Water Works Co. v. Pub. Serv. Comm. of West Virginia, 262 U.S. 683, 694 (1923), "Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking."

By Appellant's own admission, the financial integrity of the company suffered no adverse financial impact. Further, the investors were aware of the potential for disallowance.

Appellant suggests that Hope Natural Gas Co., supra, at 606 requires; 1) that the utility be made whole for its net investment and 2) that the integrity of the investment be maintained. As to the second item it is clear from the discussion infra that Appellant's financial integrity was in no way damaged.

As to the first item, Ohio law certainly allows for the recovery of an investment when it is used and useful. The Ohio Court in Consumers' Counsel, supra, indicated that the "now terminated nuclear plants represented a major capital investment that ultimately would have been included in the rate base under R.C. 4909.15(A)(1), had the

projects not been cancelled." Id., at 164. Before capital recovery is permissible, in Ohio, a utility project must be found to be operational. "The initial risk of failure is appropriately born by the investors, who have undertaken the project and who will ultimately profit for its success. It is only proper that their venture be found operational before they commence to recoup their capital outlays from the consumers." Consumers' Counsel v. Pub. Util. Comm, 58 Ohio St.2d 449, 391 N.E.2d 311 (1979). Such treatment results in a balancing of both the investors' interest and the ratepayers' interest as Hope Natural Gas Co., supra, requires: Id., at 603.

Appellant finally suggests that Washington Gas Light Co. v. Baker, 188 F.2d 11 (D.C. Cir. 1950), Cert. den. 340 U.S. 952 (1951) is "closely analagous" to the situation presented in the case sub judice.

Such is most certainly not the case. Washington Gas Light dealt with a situation wherein a plant used in the manufacture of gas was abandoned prior to full recovery through depreciation due to a switch to natural gas. Prior to abandonment the plant in question was used in providing service. This is perhaps the most important distinction noted by the court in discussing this particular aspect;

> If a unit of property resulting from prudent investment becomes obsolete before it has been recovered in full by the investor (either through annual depreciation charges or through returns sufficient to compensate for such inadequacy), it is not necessarily erroneous as a matter of law for the Commission to include it in the rate base until such recovery has occurred...
>
> But inclusion in the rate base must meet the test of justness and reasonableness to the consumers as well as to the investor.

Id., at 19

In the present case the expenditures for which Appellant seeks recovery never provided any service whatsoever. Consumers'

Counsel, supra, at 164. Appellant seeks to have the investors insulated from all risk associated with plant construction. The rate making formula in Ohio does not permit such insulation. See, Consumers' Counsel v. Pub. Util. Comm., 58 Ohio St. 2d 449, 391 N.E.2d 311 (1979). Nor does Hope Natural Gas Co. require such a result. There has been no confiscation of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Therefore, Appellee, the Office of the Consumers' Counsel, submits that this Court should affirm the decision of the Ohio Supreme Court.

CONCLUSION

Appellant in this matter has failed to timely present for review by the Ohio Supreme Court the federal constitutional questions it would now have this Court review. This Court has already found the

lack of a properly brought federal question with respect to the issues presented in this appeal, and that earlier disposition is applicable herein. Appellant is barred from further litigation of the issues by the doctrine of res judicata. This Court should, therefore, sustain Appellee's Motion to Dismiss this appeal. In the alternative, Appellee submits that the decision of the Ohio Supreme Court should be affirmed based upon Appellee's Motion to Affirm.

Respectfully submitted,

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